IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 32 OF 2017

(Arising from the decision of the Kilombero District Court at Ifakara in Civil Appeal No. 23 of 2016. Originating from the decision of Mlimba Primary Court in Civil Case No. 46 of 2016)

OBADIA MJARIFU.....APPELLANT

Versus

1. JOHN KIGONGA.....1ST RESPONDENT
2. WINFRIDA MWAKABE.....2ND RESPONDENT

JUDGMENT

B.R. MUTUNGI, J:

This is a second appeal after the appellant herein was dissatisfied by the decision of the Kilombero District Court at Ifakara in Civil Appeal in Civil Appeal No. 23 of 2016 which upheld the decision of Mlimba Primary Court in Civil Case No. 46 of 2016. At the trial court the appellant was the plaintiff while the respondents were the defendants. The

appellant herein has raised four (4) grounds of appeal in the amended petition of appeal which are as follows;

1. *That, the District Court erred in law and fact in dismissing the appellant's appeal by only relying on a misdirected decision of the trial court which was neither from the evidence nor from the reasoning of the court.*
2. *That, the District Court erred in law and fact by only discussing and considering the evidence by the respondents adduced in the trial court leaving out the strong evidence by the appellant.*
3. *That the District Court erred in law and facts by basing its decision on irrelevant authorities to the circumstances of the case before it.*
4. *That both trial courts judgments (sic) are tainted with material irregularities and against the principles of natural justice and good conscience that the appellant were (sic) not given the right to be heard.*

The genesis of the dispute is that, the appellant had sued the respondents in the trial court claiming for Tshs.

1,197, 000/= being the amount valued for school properties given to the 1st respondent by virtue of his employment. It is in evidence that the 1st respondent had been employed first as an ordinary teacher in 2015 climbed up the ladder and was appointed the head master. His wife (2nd respondent) was his referee (guarantor) before securing the said job.

The second respondent apart from being the guarantor, she was also employed at the same school. The 1st respondent realizing that he now had a large family (a child and house girl) prayed that, he be allocated a bigger house within the school premises (Material Area). The school did offer him a house which had properties among these was a "6"x "6" mattress, a bed "3$^{1/2}$ x 6" together with a mattress, a big sofa seat together with a smaller one with pillows, a dining table, 25 tools, 10 cartons, 10 buckets a big drum (200 litres, two plastics (20 litres).

Things took a new turn after the first respondent was asked to resign due to scandals including excessive punishments and sexually harassing the school girls. In due thereof, he had also to vacate from the school premises. In the course of moving out, the 1st respondent could not account for the school properties. The second respondent turned hostile and denied to have any thing to do with these properties.

The first respondent on the other hand claimed that, by the time he left the school on 11/5/2016 he had handled over all the school properties. The second respondent admitted to have guaranteed the first respondent but this was solely in connection with the school employment not the school properties.

Having deliberated upon the evidence adduced, the trial court dismissed the case on a balance of probabilities. The appellant was dissatisfied and knocked at the door of

the District Court (Kilombero), but his appeal was once again dismissed. He has now come before this court through the window of appeal.

When this appeal was called for hearing, both parties (the appellant and the 1st respondent) appeared in person and were unrepresented. The appellant focused his arguments on the fourth ground of appeal in the amended petition of appeal.

Basically, the appellant narrated the historical background on how the said court scheduled the matter during the hearing. He submitted that the matter was set for mention on 22/11/2016 but the respondents did not appear. On 5/12/2016 he prayed to make an amendment which was ordered to be filed by 6/12/2016 and matter fixed for mention on 30/12/2016. On the said date the case was not called up till 27/2/2017 when the court would deliver its

judgment. As ordered, on 27/2/2017 the court did deliver its judgment where he lost the case.

He further lamented he was not given the right to be heard when the first appellate court determined his appeal. The appellant suggested the error occasioned by the first appellate court was fatal since it contravened Article 13 (1) (a) of the Constitution of the United Republic of Tanzania of 1977 (as amended from time to time). He also cited the case of **HUSSEIN KHANABHAI VERSUS KODI RALPH SIARA, CIVIL REVISION NO. 25 OF 2014 (CAT-AR) (UNREPORTED)**. The appellant prayed the said decision be quashed in order that, he be accorded a right to be heard hence prayed his appeal be allowed.

In reply, the 1st respondent admitted to have been sued by the appellant, a matter which went up to the District Court on appeal. He went further by submitting that, on 5/12/2016 when the said appeal was called for hearing,

both parties were present and both sides admitted that they had nothing to add. The 1st respondent submitted further that, the first appellate court scheduled the matter to 30/12/2016 for delivery of its judgment. On the said date the 1st respondent was absent with notice to the court. The judgment was delivered on 27/2/2017 in the 1st respondent's favour. He thus insisted the parties were given a right of hearing. He thus prayed the appeal be dismissed with costs.

The appellant in his rejoinder admitted the first appellate court did cross- examine them but he expected the appeal would be argued by oral submissions. Since this was not done, then he was not availed a hearing.

The issue here is whether the appeal has merits or otherwise.

I have gone through the entire court record, the submissions from both parties and I find the appellant's major grievance is that he had no right of hearing. In order

to keep a proper record as to what transpired at the hearing of the appeal, it is imperative to note down the respective sequence of events.

On 7th November, 2016 the appellant and the 1st respondent were absent and the appellant prayed to file something which is not revealed before 14/11/2016. The order that followed simply stated;

> ***Order: Hearing on 22/11/2016***
> ***SGD: B.N. MASHABARA***
> ***RESIDENT MAGISTRATE I***
> ***7/11/2016***

When the matter came up for hearing on 22/11/2016 it was only the appellant present and the matter adjourned to 5/12/2016. Fortunately, all the parties were present on 5/12/2016 and the matter was set for judgment on 30/12/2016. The file is seen to be before the court on 27/2/2017 where the court in the absence of the respondent delivered its judgment.

It is a well known principle of law that despite making appearances, proceedings should be well recorded in such a way that the court record speaks for itself. Perusing through the extract of the proceedings above it is very obvious that there is nowhere mentioned that, the parties had been addressed as to the way the appeal was to be disposed. In that regard whether oral, written submissions or the court to proceed to write the judgment on the evidence before it.

In my settled view the first appellate court denied the parties herein their rights to be heard. In the case of **HUSSEIN KHANBHAI VERSUS KODI RALPH SIARA, CIVIL REVISION NO. 25 OF 2014 (CAT-AR) (UNREPORTED)** at pages 3 and 4 the Court of Appeal of Tanzania held;

> *'This Court in various decisions has emphasized on the right to be heard. In line with the aud alteram partem rule of natural justice, the*

*court is required to accord the parties a full hearing before deciding the matter in dispute or issue on merit...**A denial of a right to be heard, has the effect of vitiating the proceedings.'*** [Emphasis is mine]

Again, at page 4 the Court of Appeal cited with approval the case of **DISHON JOHN MTAITA VERSUS THE DPP, CRIMINAL APPEAL NO. 132 OF 2004 (UNREPORTED)** where it was further emphasized that;

'...consistent with the settled law, we are of the firm view that the decision of the High Court reached at was in violation of the appellant's constitutional right to be heard and cannot be allowed to stand. It was a nullity.'

Having observe so, I agree with the appellant that the entire proceedings and judgement of the first appellate court are a nullity. The fourth ground suffices to determine the appeal. As regards the rest of the grounds, the parties for some unknown reasons made no submission on them,

hence the court has nothing to deliberate upon. In the event, I hereby allow the appeal, quash and set aside the entire proceedings and judgment in Civil Appeal No. 23 of 2016. I further direct the said appeal file be remitted to the District Court of Kilombero for hearing de- novo by a different Magistrate with competent jurisdiction. I make no order for costs as the error occasioned was not caused by the parties rather it was the first appellant's court making.

It is so ordered.

B.R. MUTUNGI

JUDGE

18/4/2018

Right of Appeal Explained.

B.R. MUTUNGI

JUDGE

18/4/2018

Read this day of 18/4/2018 in the presence of appellant and respondent.

B.R. MUTUNGI

JUDGE

18/4/2018